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No. 97-_____

IN THE

Supreme Court Of The United States

OCTOBER TERM 1996

GULF BEACH HOTEL, INC.,
Petitioner,

v.

HILTON INNS, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

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36 pp

I

CAN PARTIES, BY INCLUSION OF A "CHOICE OF LAW" PROVISON IN A CONTRACT, DEFEAT THE FUNDAMENTAL PUBLIC POLICY OF THE STATE WHERE THAT CONTRACT IS TO BE PERFORMED?

We contend they cannot, and that the Ninth Circuit's erroneous conclusion that the parties here could and did warrants a grant of a writ of certiorari to prevent clear constitutional deprivations which result from that conclusion. In other words, the parties to a contract for the lease of a building located in the State of Alabama (or Ohio, etc.) could not, by agreeing that they would be bound by the laws of the State of Nevada, operate a casino on the premises if by so doing they ran afoul of the public policy of the state of performance.

II

DID THE NINTH CIRCUIT COURT OF APPEALS RUN AFOUL OF THIS HONORABLE COURT'S HOLDING IN *CHATTANOOGA BUILDING AND LOAN ASSOCIATION v. DENSON*, 189 U.S. 408 (1903), IN THE CASE AT BAR?

We contend that it did, and that its unpublished decision in this case amounts to an overruling, *sub silentio*, of a decision of this Honorable Court, which cannot stand.

III

DOES THE NINTH CIRCUIT DECISION HERE IN ISSUE CREATE A CONFLICT WITHIN THE CIRCUITS WHICH WARRANTS A GRANT OF A WRIT OF CERTIORARI?

We insist that it does, and that numerous Fifth and Eleventh Circuit decisions, consistent with this Honor-

able Court's decision in *Chattanooga Building and Loan Association, supra,* are in sharp conflict with the unpublished decision in this case.

IV

WAS THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION VIOLATED WHEN THE NINTH CIRCUIT DISREGARDED ALABAMA'S PUBLIC POLICY, AND CHOSE INSTEAD TO APPLY A CALIFORNIA "CHOICE OF LAW" STATUTE TO THE CONTRACT HERE IN ISSUE?

We contend that it was, and that under both California and Alabama law, as well as the Tenth Amendment, the Court of Appeals was required, in this diversity suit, to defer to the public policy of Alabama — the only state where this contract can be performed.

CERTIFICATE OF INTERESTED PERSONS

Respondents' Counsel	Steven W. Bacon Neil D. Martin
Counsel for the State of Alabama	Hon. William Pryor, Attorney General of Alabama, Successor in Office to Jeff Sessions, who filed an amicus brief for the State of Alabama upon the issue embraced by this Petition
Petitoner's Counsel	William J. Baxley Joel E. Dillard Charles F. Palmer
Trial Judge	Hon. Manuel L. Real
Respondent	Hilton Inns, Inc.
Petitioner	Gulf Beach Hotel, Inc.
Ninth Circuit Judges	Hon. Alfred T. Goodwin Hon. Michael Daly Hawkins Hon. Alfredo C. Marquez, sitting by designation as Senior District Judge for the District of Arizona

No other persons are known to have participated directly or indirectly in the appeal of this matter. A writ of mandamus was, however, granted in favor of Gulf Beach, and directed to the Hon. Manuel L. Real, in this same action upon a different issue by a panel of Ninth Circuit Judges. That panel consisted of Circuit Judges Betty Binns Fletcher, Cecil F. Poole and Diarmuid F. O'Scannlain, none of whom were involved in rendering the judgment which is the subject of this petition.

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STATEMENT OF GROUNDS OF JURISDICTION

The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1254, because this Petition is from a decision of the Ninth Circuit Court of Appeals in a civil case.

(i) Date of the decision: August 16, 1996

(ii) Application for Rehearing overruled: November 6, 1996

(iii) No cross petition has been filed.

(iv) Jurisdiction is based on 28 U.S.C. § 1254 and Rule 10(a) in that the decision in issue is in conflict with this Honorable Court's decision in *Chattanooga National Building & Loan Ass'n v. Denson*, 189 U.S. 408 (1903), and is also in conflict with decisions in the Fifth and Eleventh Circuits, cited herein. We submit that it also violates Amendment X of the United States Constitution.

STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings and Disposition

Hilton Inns, Inc., a Delaware corporation headquartered in Los Angeles, California ("Hilton"), sued Gulf Beach Hotel, Inc., an Alabama corporation, dba Perdido Beach Hilton ("Gulf Beach"), in the United States District Court for the Southern District of Alabama on August 31, 1992, seeking to enjoin it from terminating a license agreement between them. (R. 64) The following day, the District Court in Alabama denied Hilton the injunctive relief it sought because Hilton conceded it was not qualified to do business in Alabama. (R. 112) Upon learning, via this denial of injunctive relief, that it was barred by the constitution and statutes of Alabama from enforcing the license agreement in issue, Hilton promptly abandoned its lawsuit in the District Court for the Southern District of Alabama, and refiled it in the Superior Court of the State of California for the County of Los Angeles. (R. 4) After a timely removal to the

United States District Court for the Central District of California (R. 1), Gulf Beach filed counterclaims (R. 134) and subsequently, on May 17, 1993, moved for summary judgment upon grounds that the same provision of the Constitution of Alabama which prevented enforcement of the license agreement in the United States District Court for the Southern District of Alabama barred recovery in any court in the country. (R. 185) This motion was denied by the Honorable Manuel Real, Presiding Judge of the Central District of California on June 29, 1993. (R. 1056)

Subsequently, Judge Real entered a summary judgment in favor of Hilton (R. 1766), which was reversed on appeal by the Ninth Circuit Court of Appeals on grounds other than the one here in issue — whether or not the Constitution of Alabama bars recovery by Hilton against Gulf Beach, absolutely. (Appendix, A-1)

On appeal to the Ninth Circuit, the Attorney General of Alabama filed a brief, as amicus curiae, asserting that the Constitution of Alabama was and is the most cogent expression of its fundamental, public policy. While careful to take no position upon the relative merits of the contract dispute between Hilton and Gulf Beach, the Alabama Attorney General made it clear, in brief, that the State of Alabama has a profound stake in preservation of its public policy in all courts. This brief is attached to this petition, as Appendix pages 9-18. Nevertheless, the Court of Appeals rejected Gulf Beach's and the State of Alabama's contention that its public policy, expressed in the constitutional provision here in issue, was entitled to enforcement in California as readily as in Alabama. This erroneous choice of law interpretation is the only aspect of the Ninth Circuit's judgment — a judgment which was otherwise wholly favorable to Gulf Beach — which is in issue here.

If this Honorable Court grants the writ, and determines this issue in Gulf Beach's favor, this case — which

is now on remand following the Ninth Circuit's reversal — will immediately end, and the judgment below will not only be reversed, it will be rendered.

More significantly, the precedent of this Honorable Court's decision in *Denson, supra,* will be reestablished and preserved. Private parties will not, if this Honorable Court grants the writ and reverses the decision below, labor under any misapprehension that they are free to contract away any state's public policy applicable to the performance of contracts within its borders. We maintain that it is for corrective purposes such as these that certiorari exists.

ARGUMENT

The District Court and the Ninth Circuit Court of Appeals have effectively disregarded a judgment of this Honorable Court, *Chattanooga National Building & Loan Ass'n v. Denson,* 189 U.S. 408 (1903), in a manner we contend falls within the "so far departed from the accepted and usual course of judicial proceedings" reason for granting the writ described by Rule 10.1(a) of the Rules of this Honorable Court. Additionally, the Ninth Circuit's judgment and opinion conflicts with decisions of the Fifth and Eleventh Circuits which have consistently upheld enforcement of the same Alabama constitutional provision in federal courts in diversity cases. *Advance Industrial Security v. William J. Burns I. D. Agency,* 377 F.2d 236 (5th Cir. 1967); *Continental Telephone Corporation v. Weaver,* 410 F.2d 1196 (5th Cir. 1969); *S & H Contractors v. A. J. Taft Coal Co.,* 906 F.2d 1507 (11th Cir. 1990), *cert. den.* 498 U.S. 1026 (1992).

The Ninth Circuit's unpublished opinion cobbles a choice of law provision in the license agreement ("This agreement shall be governed by and construed in accordance with the laws of the State of California") to a California statute (Cal. Civ. Code § 1646.5, provides that

parties to a contract involving not less than two hundred fifty thousand dollars may agree that California law shall govern their rights and duties under the contract "whether or not the contract, agreement, or undertaking or transaction bears a reasonable relation to this state"). It then affirms the District Court's denial of summary judgment to Gulf Beach in a manner which is inconsistent with the case law of *both* California and Alabama. Alabama, of course, is where the hotel in issue is located, and hence the only state where performance can take place. Strong public policy of the performance state, expressed in its constitution, should have trumped any choice of law provision, and rendered Cal. Civ. Code § 1646.5 irrelevant. If this were not the case, private parties wishing to establish a gambling casino in downtown Los Angeles could simply provide by contract that the laws of the State of Nevada applied, and defeat the public policy of the State of California prohibiting casino gambling without Legislative approval.

We do not contend that private parties are not free to choose the laws of any state in the union to govern lesser contractual obligations. We do, however, contend that a state where contract performance must take place cannot have its public policy, stated in its constitution and two separate statutes, overridden by that choice.

In *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal. 4th 459, 11 Cal. Rptr. 2d 330 (1992), the California Supreme Court set forth the analysis to be utilized to determine the enforceability of a contractual choice of law provision:

> "In determining the enforceability of arm's-length contractual choice-of-law provisions, California courts shall apply the principles set forth in Restatement Section 187, which reflect a strong policy favoring enforcement of such provisions.

> "More specifically, Restatement Section 187, subdivision (2) sets forth the following standards: 'The law of the state chosen by the parties to govern their contractual rights and duties will be applied . . . unless either (a) the chosen state has no substantial relationship to the parties' choice, **or (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.**" (Emphasis supplied)

Id., at 464-65, 11 Cal Rptr.2d at 333 (footnotes omitted). And § 188 provides, in pertinent part:

> "In the absence of an effective choice of law by the parties (see § 187) the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include: (a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties. These contacts are to be evaluated according to their relative importance with respect to the particular issue."

Here, the subject matter of the contract is a hotel franchised by Hilton and located in Alabama. The License Agreement was negotiated, at least in part, in Alabama and Hilton sent employees to Alabama to view the hotel property before construction, and to regularly inspect the premises after operations began. The assignment of the agreement to Gulf Beach was executed in Alabama. The License Agreement was performed by Gulf Beach in

Alabama, and Gulf Beach is incorporated under the laws of the State of Alabama. Although Hilton has its principal place of business in California, it is a Delaware corporation. There is thus a single spoke in California, while the hub of this transaction rests in Alabama. Moreover, Alabama does not equivocate where the fundamental public policy basis for this particular state constitutional provision is concerned.

Art XII, § 232 of the *Constitution of Alabama of 1901* provides:

> "No foreign corporation shall do any business in this state without . . . an authorized agent or agents therein, and without filing with the secretary of state a certified copy of its articles of incorporation or association . . . "

Code of Alabama 1975, § 10-2A-247(a), also provides:

> "All contracts or agreements made or entered into in this state which have not obtained a certificate of authority to transact business in this state shall be held void at the action of such foreign corporation or any person claiming through or under such foreign corporation by virtue of said void contract or agreement; but nothing in this section shall abrogate the equitable rule that he who seeks equity must do equity . . ."

along with a parallel provision of Alabama law, *Code of Alabama* 1975, § 40-14-4, which states, similarly:

> "All contracts made in this state by any foreign corporation which has not first complied with the provision of sections 40-14-1 through 40-14-3 shall, at the option of the other party to the contract, be wholly void at the action of such foreign corporation or any person claiming through or under such foreign corporation by virtue of such contract . . . Before so qualifying, such foreign corporation shall be required to

> pay all qualification fees or admission taxes required by sections 40-14-1 through 40-14-3 for all years which it transacted business in this state, together with such interest and penalties thereon as may be assessed in accordance with law."

The significance of this state constitutional provision and of the statutes above described was established by the Supreme Court of Alabama in *Alabama Western Railroad Co. v. Talley-Bates Construction Co.*, 162 Ala. 396, 50 So 341 (1909):

> "They constitute a police regulation for the protection of property interests of the citizens of the state . . . the policy of the constitution and statute is to protect our citizens against the fraud and imposition of insolvent and unreliable corporations, and to place them in an attitude to be reached by legal process from our courts in favor of citizens having cause of complaint. Foreign corporations may not sue until they put themselves in a position to be sued in domestic courts. The conditions are fixed, inflexible, unalterable."

It was reiterated in *Gray-Knox Marble Co. v. Times Building Co.*, 255 Ala. 554, 144 So. 29, 31 (1932) ("The public policy clearly written into our law in order that foreign corporations may be subject to the process of our courts, thus affording mutuality of remedy, cannot be stricken down by judicial decisions.") In accord, see also *Building Maintenance Personnel, Inc. v. International Shipbuilding, Inc.*, 621 So. 2d 1303 (Ala. 1993); *Haskew v. Green*, 571 So. 2d 1029 (Ala. 1990); *Green Tree Acceptance, Inc. v. Blalock*, 525 So. 2d 1366 (Ala. 1988); *Sanjay, Inc. v. Duncan Construction Co.*, 445 So. 2d 876, 881 (Ala. 1983) ("Our constitution and statutes have created a bar precluding enforcement of contracts made by foreign corporations that fail to qualify before and at the date of the contract, where the contract is to be performed in Alabama.")

Cal. Civ. Code § 1646(5) magnanimously opens California courts to certain contract disputes involving $250,000 or more. It is not capable of dismantling California and Alabama precedents, grounded in both states' adoptions of Restatement § 187(2)(b). Yet this result will obtain here, unless the Ninth Circuit's decision is reversed.

Alabama courts have adopted the same Restatement provisions addressed by *Nedlloyd, supra*, requiring deference to fundamental public policy considerations of performance states, and to "materially greater interests" like those present here. *Cherry, Bakert & Holland v. Brown*, 582 So. 2d 502 (Ala. 1991).

Indeed, the Alabama constitutional and statutory embodiment of public policy contained in Article XII, § 232, *Constitution of Alabama*, and *Code*, §§ 10-2A-247(a) and 40-14-4 has been equally and even handedly applied by federal and state courts for decades. It "cuts both ways" in that it has been invoked by one out-of-state corporation against another, *Sanwa Business Credit Corporation* v. *G. B. "Boots" Smith Corporation*, 548 So. 2d 1336 (Ala. 1989), by litigants represented by the Legal Services Corporation against creditor corporations, *Green Tree Acceptance, Inc.* v. *Blalock*, 525 So. 2d 1366 (Ala. 1988), and in favor of banks, *George W. Muller Mfg. Co.* v. *First National Bank of Dothan*, 176 Ala. 229, 557 So. 762 (Ala. 1912) as well as against them.

This public policy action is, however, only triggered when a contractual dispute underpinning litigation assumes an intrastate character in addition to its interstate aspect. Compare, for example, *Computaflor* v. *N. L. Blaum Const. Co.*, 289 Ala. 65, 265 So. 2d 850 (Ala. 1972) with *Swicegood* v. *Century Factors, Inc.*, 280 Ala. 37, 189 So. 2d 776 (Ala. 1966). Alabama has never attempted to apply this public policy to transactions which are solely interstate in nature. Here, Hilton's contract is conceded to be intrastate, within the meaning of the applicable Alabama

constitutional and statutory provisions, and this concession is borne out by the record.

Oddly enough, it is California law which most emphatically makes Gulf Beach's case for application of Alabama public policy law to the dispute between it and Hilton. The same Restatement terms which compelled the Alabama Supreme Court to insist upon deference to the public policy of the state where contract performance was to occur in *Cherry, Bakert & Holland, supra,* have been historically pivotal to the Ninth Circuit, *Davis* v. *Jointless Fire Brick Co.*, 300 F. 1 (9th Cir. 1924); *Sims Snowboards, Inc.* v. *Kelly*, 863 F.2d 643 (9th Cir. 1988), and to California appellate courts, as well. *Frame* v. *Merrill, Lynch, Pierce, Fenner & Smith, supra,* 20 Cal. App. 668, 97 Cal. Rptr. 811 (1971). Still the Ninth Circuit, in the unpublished opinion and judgment that promises to be — unless reversed by this Honorable Court — the law of *this* case, was so overwhelmed by a mere California statute (never cited or relied upon by either party, or the trial court) that it swept aside *Denson, supra,* as well as decades of soundly reasoned California, Alabama, Ninth, Fifth and Eleventh Circuit precedent along with the fundamental, strong public policy of Alabama. In this vein, it simply missed the point. The statute in issue — Cal. Civ. Code § 1646.5 — simply and progressively "opens up" the courts of California to disputes which might not otherwise be determined under the law of California. It cannot have ever been intended to serve as a vehicle for voiding the public policies of other states, or for denying other states their sovereign rights to apply basic, fundamental public policies to the performance of contracts within their borders. Section 187(2)(b) of the Restatement specifically reserves to Alabama, in this instance, its public policy in a manner which the California legislature cannot have intended to modify. If such a misguided intention did exist in the collective brain trust of the California legislature when it enacted § 1546.5, it would nevertheless fail, mis-

erably, to effect that purpose in the wake of the Tenth Amendment to the United States Constitution, which provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

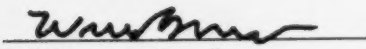
Certainly, neither the legislature of the State of California nor any federal court sitting there, interpreting its statutes, has a right to rob the State of Alabama of application of its public policy, stated in its Constitution, to the performance of contracts within it borders. Under Amendment X, this is a matter neither delegated to the United States by the Constitution, nor prohibited by it to the states. It is reserved to the State of Alabama. If the Tenth Amendment means what it says, the public policy of Alabama is not subject to dilution or dissolution by the State of California.

CONCLUSION

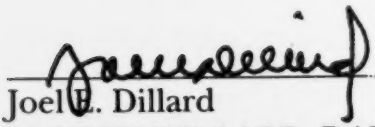
While otherwise favorable to Gulf Beach in every respect, the Ninth Circuit's decision which is the subject of this petition will become the law of this case, decided in a manner which is not only destructive of the public policy of Alabama within its borders, but also violative of precedent established by this Honorable Court in *Chattanooga National Building & Loan Association, supra,* the Tenth Amendment to the Constitution of the United States, and precedents established by decades of decisions by the Alabama Supreme Court, the Fifth Circuit Court of Appeals, and the Eleventh Circuit Court of Appeals. This is respectfully submitted to be an error of the exact proportion for which the writ of certiorari exists. We respectfully petition this Honorable Court, upon consideration of the decision below and the reasons for review presented here, to grant the writ of certiorari and restore to

Alabama its right to develop and apply within its own borders, consistently within the purview of the Tenth Amendment to the United States Constitution, its own basic, fundamental public policy.

Respectfully submitted,



William J. Baxley



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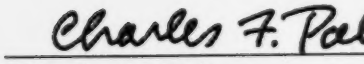

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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the above and foregoing have been served by being placed in first class mail, properly addressed with postage prepaid, this 3rd day of February, 1997, upon all counsel of record, as follows:

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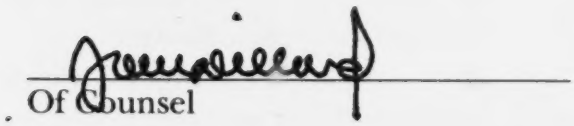

Of Counsel

APPENDIX

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HILTON INNS, INC., a Delaware corporation,	)	No. 94-56635
Plaintiff - Appellee,	)	D.C. No.
v.	)	CV-92-06293-R
GULF BEACH HOTEL, INC., d/b/a PERDIDO BEACH HILTON, an Alabama corporation; DOES 1 THROUGH 100, inclusive,	)	MEMORANDUM*
Defendants - Appellants	)	

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, Chief Judge, Presiding

Argued and Submitted April 10, 1996
Pasadena, California

Before: GOODWIN and HAWKINS, Circuit Judges, and MARQUEZ,** District Judge.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** Honorable Alfredo C. Marquez, United States Senior District Judge for the District of Arizona, sitting by designation.

Gulf Beach Hotel, Inc. ("Gulf Beach") appeals the district court's denial of its motion for summary judgment and entry of judgment in favor of Hilton Inns, Inc. ("Hilton") on the issue of liability in this breach of contract action. Gulf Beach also appeals numerous evidentiary rulings the district court made at the trial on damages. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm in part and reverse in part.

I.

Gulf Beach moved for summary judgment on the ground that Alabama law governs the parties' contract, and under Alabama law Hilton is precluded from bringing this suit because it was not registered in Alabama at the time the License Agreement was executed.

Applying California conflicts of laws rules, *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941), we agree with the district court that Paragraph 18 of the License Agreement, which designates California law as the applicable law, is enforceable.

Cal. Civ. Code § 1646.5 provides that the parties to a contract involving not less than two hundred fifty thousand dollars may agree that California law shall govern their rights and duties under the contract "whether or not the contract, agreement, or undertaking or transaction bears a reasonable relation to this state." Section 1646.5 applies to contracts "entered into before, on, or after its effective date; it shall be fully retroactive."

Gulf Beach does not dispute that the transaction covered by the License Agreement involved more than $250,000 in the aggregate. Gulf Beach contends, however, that a proper choice of law analysis would include consideration of Alabama's strong policy of prohibiting foreign corporations not registered in the state from enforcing contracts against Alabama citizens. This contention fails in light of the legislative history to § 1646.5,

which reveals that California lawmakers believed the section "would exempt court actions 'arising from such contracts, agreements or undertakings from provisions of law which authorize the court to stay or dismiss actions on the basis that the interests of substantial justice require the action to be heard in an out-of-state forum.'" *Credit Lyonnais Bank Nederland. N.V. v. Manatt, Phelps, Rothenberg & Tunney,* 202 Cal. App. 3d 1424, 1434 n. 14. 249 Cal. Rptr. 559, 564 n. 14 (1988) (quoting Sen. Rules Com., 3d reading, Analysis of Assem. Bill No. 3223 (1985-86 Reg. Sess.))

Because under California substantive law Hilton is not precluded from maintaining this action despite its failure to register in Alabama prior to the execution of the License Agreement, the district court correctly denied Gulf Beach's motion for summary judgment.

II.

Hilton filed a motion for summary judgment on liability, arguing that, as a matter of law, Gulf Beach materially breached by terminating the License Agreement. Gulf Beach defended by contending that it had a right to terminate because Hilton materially breached first. *See Superior Motels, Inc. v. Rinn Motor Hotels, Inc.,* 195 Cal. App. 3d 1032, 1051, 241 Cal. Rptr. 487, 495 (1987). The district court originally denied this motion but granted it upon reconsideration.

According to the License Agreement, Gulf Beach agreed to operate in accordance with the provisions of the License Agreement and Hilton's Operating Manual, which could be revised from time to time. While it might be argued that the actions Gulf Beach contends were material breaches of the License Agreement on Hilton's part are consistent with the revised Operating Manual, counsel at oral argument quite properly admitted that the Operating Manual could only be revised in a com-

mercially reasonable manner. Because we find there exists a genuine issue of material fact as to whether it was commercially reasonable for Hilton to revise the Operating Manual (1) to require the purchase of a new computer system when the Perdido Beach Hilton already had a computer system; (2) to require the sharing of reservation information; and (3) to provide for a different method of allocating the cost of the reservation system, Hilton is not entitled to summary judgment, and a trial on the merits is necessary.

III.

Where, as here, a district court fails to give reasons for denying a motion to amend, we reverse unless the record clearly dictates the denial of the motion. *Mayes v. Leipziger*, 729 F.2d 605, 608 (9th Cir. 1984).

Although Hilton contends that the motion was untimely because it was brought "on the eve of the original trial date" and was set for the date of the original pre-trial conference, we note that the motion was brought before Hilton's motion for summary judgment on its breach of contract claim. Because we find that Hilton is not entitled to summary judgment, it would not be futile for Gulf Beach to pursue these counterclaims. Moreover, it is difficult to see how Hilton would have been prejudiced by the amendment because these proposed "claims" mirror Gulf Beach's defenses.

The record does not dictate the denial of the motion, and upon remand Gulf Beach should be given the opportunity to amend its counterclaim.

IV.

In light of our ruling that Hilton was not entitled to summary judgment, we need not address Gulf Beach's arguments that the district court erred in a number of its evidentiary rulings.

AFFIRMED as to Gulf Beach's motion for summary judgment; REVERSED as to Hilton's motion for summary judgment and Gulf Beach's motion to amend; and REMANDED for proceedings consistent with this memorandum disposition. Each party to bear its own costs.

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HILTON INNS, INC., a Delaware corporation,	)	No. 94-56635
Plaintiff - Appellee,	)	D.C. No.
v.	)	CV-92-06293-R
	)	(Central California)
GULF BEACH HOTEL, INC., d/b/a PERDIDO BEACH HILTON, an Alabama corporation; DOES 1 THROUGH 100, inclusive,	)	O R D E R
Defendants - Appellants.	)	

Before: GOODWIN and HAWKINS, Circuit Judges, and MARQUEZ,* District Judge.

The panel has voted to grant the Motion for Leave to File Reply to Response to Petition for Rehearing. The Reply that accompanied the Motion is deemed filed. The panel has also voted to deny the Motion for Leave to File Sur-Reply, and to deny the Petition for Rehearing.

* Honorable Alfredo C. Marquez, United States Senior District Judge for the District of Arizona, sitting by designation.

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HILTON INNS, INC., a Delaware corporation, Plaintiff, vs. GULF BEACH HOTEL, INC., dba PERDIDO BEACH HILTON, an Alabama corporation; DOES 1 THROUGH 100, inclusive, Defendants.	No. 92 6293 R ORDER DENYING MOTION FOR SUMMARY JUDGMENT

On May 24, 1993, at 10:00 A.M. the motion of defendant Gulf Beach Hotel, Inc. for summary judgment came on for hearing. Charles F. Palmer of Perkins Coie and

William J. Baxley of Baxley, Dillard, Dauphin & McKnight appeared on behalf of defendant and moving party Gulf Beach Hotel, Inc.; Steven W. Bacon of Hill, Farrer & Burrill appeared on behalf of plaintiff and responding party, Hilton Inns, Inc.

Upon consideration of the pleadings in support of, and in opposition to, said motion, and good cause appearing therefor,

IT IS HEREBY ORDERED that said motion of defendant Gulf Beach Hotel, Inc. for summary judgment is denied.

Dated: May 25, 1993

/s/ Manuel L. Real

Honorable Manuel L. Real,
United States District
Court Judge

CASE NO. 94-56635

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HILTON INNS, INC.,

Plaintiff and Appellee,

vs.

GULF BEACH HOTEL, INC. dba
PERDIDO BEACH HILTON,

Defendant and Appellant.

Appeal from the United States District Court
Central District of California
The Hon. Manuel Real
Case No. CV-92-6293-R

AMICUS CURIAE BRIEF OF THE STATE OF ALABAMA

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AMICUS CURIAE

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BRIEF AND ARGUMENT OF AMICUS CURIAE

The State of Alabama takes no position upon the merits of the dispute between Gulf Beach Hotel and Hilton, indeed it would be improper to do so. However, the State of Alabama, acting through its Attorney General, is by this submission compellingly interested in addressing obvious public policy concerns which relate to Alabama's constitutional and statutory provisions which require out of state corporations doing business in Alabama to register with its Secretary of State, or suffer appropriate sanctions for failing to do so.

Alabama has, at all times relevant to the case now before this Court, maintained a fundamental public policy forbidding foreign corporations from doing intrastate business within its borders unless they first qualify to do so with our Secretary of State. Intrastate business is defined by our case law, by the Fifth and Eleventh Circuits; and by the United States Supreme Court. Indeed, the United States Supreme Court, in *Chattanooga National Building and Loan Association v. Denson,* 189 U.S. 408, upheld the same laws which are now under review by this Court because our state makes their enforcement a matter of its public policy. The U.S. Supreme Court, in *Denson,* specifically held that foreign corporations which fail to qualify to do business in our state execute contractual agreements at the risk of being "repelled from court" because failure to qualify is "of so much importance as to be enjoined by the constitution of the state." 189 U.S., at 416. *Constitution of Alabama of 1901,* Article XII, § 232.

The Attorney General of Alabama is sworn to uphold the laws and the constitution of the State of Alabama. These are reasonable laws which have been applied uniformly to foreign corporations since their inception. They apply to contracts executed in other states, *Sanwa Business Credit Corporation v. G. G. "Boots" Smith Corpora-*

tion, 548 So. 2d 1336 (Ala. 1989), and protect individuals as well as domestic corporations, *Boles v. Midland Guardian Company*, 410 So. 2d 82 (Ala. 1982). They have been invoked for the protection of clients of such meager means as to be represented by Legal Services Corporation of Alabama, *Green Tree Acceptance, Inc. v. Blalock*, 525 So. 2d 1366 (Ala. 1988), and by out-of-state corporations which qualify to do business in Alabama against foreign corporations which fail to do so. *Sanwa, supra; Stewart Machine and Engineering Company v. Checkers Drive In Restaurants of North America*, 575 So. 2d 1072 (Ala. 1991).

As noted above, the Attorney General takes no position regarding whether there was or was not an intrastate presence in the case at bar. This is obviously a matter for an appropriate Court to determine on a case by case basis. In making this determination, however, Alabama law as to its public policy must be applied. In this regard, *Allstate Leasing Corporation v. Scroggins*, 541 So. 2d 17 (Ala. Civ. App. 1989) is particularly instructive. *Allstate, supra*, addresses the factual underpinnings which trigger the Alabama forum closing laws. Our Court of Civil Appeals, quoting *Green Tree Acceptance, supra*, noted the flexibility of these forum closing laws:

> There is no inflexible rule we can apply, however, in determining whether a foreign corporation is doing business in Alabama within the meaning of § 10-2A-247(a). Each case must be decided upon its own particular facts.
>
> — 541 So. 2d. at 18

Indeed, the question of whether a foreign corporation is doing business within the state, within the ambit of our forum closing laws, is a mixed question of law and fact. *Swicegood v. Century Factors, Inc.* 280 Ala. 37, 189 So. 2d 776 (Ala. 1966).

Performance of a given contract in Alabama is the key to application of these laws, and where a contract is entered into is immaterial because "[t]he validity of a contract is determined by the law of the State where it is to be performed." *Alabama Western Railroad Co. v. Talley-Bates Construction Co.* 162 Ala. 396, 50 So. 341 (Ala. 1909). See also, *Sanjay, Inc. v. Duncan Construction Company, Inc.*, 445 So. 2d 876 (Ala. 1984), and *Haskew v. Green*, 571 So. 2d 1029 (Ala. 1990), which explain that our forum closing laws are so interpreted because they exist to afford protection to the public.

The Eleventh Circuit employed the above cited "localized activity" test recently in *S & H Contractors, Inc. v. A. J. Taft Coal Co.*, 906 F.2d 1507 (11th Cir. 1990), *cert. den.* 498 U.S. 1026 (1991), and upheld application of Alabama's forum closing laws in a contract action appealed from a Georgia district court. The Fifth Circuit has, likewise, repeatedly upheld these laws in diversity actions whenever performance takes place in Alabama, and sufficient intrastate activity takes place. *Advance Industrial Security v. William J. Burns International Detective Agency, Inc.*, 377 F.2d 236 (5th Cir. 1967); *Associates Capital Services Corporation v. Loftin's Transfer and Storage Company, Inc.* 554 F.2d 188 (5th Cir. 1977); *Sar Manufacturing Company v. Dumas Bros. Mfg. Co.*, 526 F.2d 1283 (5th Cir. 1976). In each of these federal cases, the periodic presence of a foreign corporation's agents in Alabama, coupled with their engagement in activities which were intrastate in nature, proved decisive. Compare, also, *Computaflor Company, Inc. v. N. L. Blaum Construction Co.*, 289 Ala. 65, 265 So. 2d 850 (Ala. 1972), *Building Maintenance Personnel, Inc. v. International Shipbuilding, Inc.*, 621 So. 2d 1303 (Ala. 1993), and *Competitive Edge v. Tony Moore Buick-GMC*, 490 So. 2d 1242 (Ala. Civ. App. 1986), where the sufficient intrastate activity existed to warrant application of these laws, with *Wise v. Grumman Credit*

Corp., 603 So. 2d 952 (Ala. 1992), where it did not. Simply stated, whenever judicial examinations of transactions by agents of foreign corporations have resulted in determinations that both intrastate and interstate activity occurred, our fundamental public policy interests have always prevailed over claims that the penalties imposed by them were too severe. *George M. Muller Manufacturing Company v. First National Bank of Dothan*, 176 Ala. 229, 57 So. 762 (Ala. 1912); *Gray-Knox Marble Co. v. Times Building Co.*, 225 Ala. 554, 144 So. 29 (Ala. 1932); *Calvert Iron Works, Inc. v. Algernon Blair, Inc.*, 284 Ala. 655, 227 So. 2d 424 (Ala. 1969). Additionally, proper qualification to do business in Alabama, after a lawsuit has been commenced, is to no avail. *Sea Scaping Construction Co. v. McAtee*, 402 So. 2d 919 (Ala. 1981).

CONCLUSION

In conclusion, the State of Alabama's only interest in this matter is preservation of a fundamental public policy which has been carefully preserved by the United States Supreme Court, the Alabama Appellate Courts, and every United States Circuit Court which has been presented with an opportunity to preserve it. The undersigned, as its Attorney General, respectfully submits that this Court should, after examining the authorities cited herein, preserve that interest consistently with them.

Respectfully submitted,

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Supreme Court, U.S.
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No. 96-1281

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

GULF BEACH HOTEL, INC.,
Petitioner,
v.
HILTON INNS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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25 pp

QUESTION PRESENTED

Whether the Ninth Circuit—which was required to apply the forum state's conflict of law rules to determine what law governs the enforceability of the contract at issue in this diversity action—properly interpreted California law to require the application of the law chosen by the parties to the contract.

RULE 29.6 STATEMENT

Respondent Hilton Inns, Inc. is a Delaware corporation with its principal place of business in California. Hilton Inns, Inc. is a wholly-owned subsidiary corporation of Hilton Hotels Corporation, a Delaware corporation with its principal place of business in California. Hilton Inns, Inc. does not own any interest in any nonwholly-owned subsidiary corporation.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1281

GULF BEACH HOTEL, INC.,
Petitioner,

v.

HILTON INNS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

Petitioner Hilton Inns, Inc. requests this Court to deny the Petition for Certiorari for the reasons set forth herein.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case concerns the application of California Civil Code Section 1646.5 (West 1997). Petitioner also relies upon Article XII, § 232 of the Alabama Constitution, Code of Alabama 1975 Section 10-2A-247(a), Code of Alabama 1975 Section 40-14-4, and the Tenth Amend-

ment to the United States Constitution. These provisions are set forth in the appendix to this brief.

STATEMENT OF THE CASE

In 1992, petitioner Gulf Beach Hotel, Inc. ("Gulf Beach"), an Alabama corporation, repudiated its License Agreement with respondent Hilton Inns, Inc. ("Hilton"), a Delaware corporation headquartered in California. This case arises out of Hilton's suit against Gulf Beach for breach of contract in California. Despite the parties' contractual agreement to be bound by California law, Gulf Beach claims that courts sitting in California were required to bar Hilton's breach of contract action under Alabama's "forum-closing" laws because Hilton inadvertently failed to qualify to do business in Alabama. Based on an interpretation of California state conflict of law rules, both the district court and the Court of Appeals for the Ninth Circuit held that Hilton was entitled to pursue its action in a California forum, because the law of California governed Hilton's right to enforce its contract. That decision rests on a fact-specific application of the state law of California, and raises no issue appropriate for review by this Court.

A. Factual Background

Hilton operates a system of franchise hotels throughout the United States under the Hilton name. In 1986, Hilton and an Alabama joint venture entered into a 20-year License Agreement, which was subsequently assigned to petitioner. The License Agreement was negotiated in California, signed by Hilton in California, and partly performed by Hilton in California. Hilton has no office and no employees in Alabama. None of the negotiations took place in Alabama, and no person residing in Alabama was involved in the negotiations that took place in California. (SER 1-13.)[1]

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[1] Citations to the record set forth herein refer to the Excerpts of Record ("ER") or the Supplemental Excerpts of Record ("SER") filed in the Ninth Circuit.

The License Agreement authorized petitioner to use the Hilton name and to employ the Hilton system of hotel operation with respect to a hotel in Orange Beach, Alabama. In exchange, Gulf Beach agreed to pay Hilton an annual license fee, to pay its share of costs associated with the Hilton reservation system, and to adhere to the policies and procedures set forth in Hilton's operating manual. (ER 2661-68.) In addition, the parties agreed in Paragraph 18 of the License Agreement that their Agreement "shall be governed by and construed in accordance with the laws of the State of California," the state where Hilton maintains its principal place of business. (ER 2665.) The License Agreement also afforded Gulf Beach limited rights to terminate the Agreement. (ER 2669-70.)

In August 1992, without any notice or warning, Gulf Beach sent a letter to Hilton stating that it had "elect[ed] to terminate" the License Agreement some 15 years prior to its date of expiration. (ER 323.) That letter did not set forth any grounds whatsoever for Gulf Beach's repudiation of the contract. (*Id.*) Hilton promptly advised Gulf Beach that it had no right to terminate the License Agreement (ER 324-25), but Gulf Beach proceeded to carry out its unilateral termination of the contract. Gulf Beach removed every reference to Hilton from its hotel operations, withdrew from Hilton's central reservation system, and ceased making the payments to Hilton required under the License Agreement. (ER 2008, ¶ 7.) At the time Gulf Beach repudiated the Agreement, the annual license fee owed to Hilton was approximately $450,000 per year—a contractual obligation worth approximately $6.5 million to Hilton. (ER 2659.)

Hilton initially filed an action in the United States District Court for the Southern District of Alabama on August 31, 1992, in an effort to enjoin Gulf Beach's repudiation of the contract. The following day, the district court declined to grant a temporary restraining order because Hilton had inadvertently failed to comply with

Alabama laws governing the registration of foreign corporations seeking to transact business in Alabama, and Alabama's "forum-closing" laws prevent foreign corporations that have not qualified to do business from enforcing otherwise valid contracts in Alabama courts under certain circumstances. (ER 112-14.) Hilton could not cure an inadvertent failure to comply with these laws through registration with the State subsequent to the execution of the contract.[2] Hilton accordingly sought and obtained the voluntary dismissal of its action without prejudice shortly after it had been filed. (ER 115.)

B. Proceedings Below

Hilton originally initiated this action in the Los Angeles County Superior Court on September 18, 1992. Gulf Beach removed the case to the United States District Court for the Central District of California based upon diversity of citizenship. (ER 1-58.) Gulf Beach then promptly initiated a series of unsuccessful attempts to require the transfer of the action to Alabama, or to require the dismissal of the action in California based upon Alabama's forum-closing laws.

1. Gulf Beach first filed a motion to transfer the case to the Southern District of Alabama pursuant to 28 U.S.C. § 1404(a). (ER 2939.) On November 18, 1992, however, the district court determined that the action should proceed in California, and denied Gulf Beach's motion. (*Id.*) Gulf Beach then filed a motion for summary judgment asserting that the License Agreement was unenforceable because Hilton had failed to qualify to transact intrastate business in Alabama prior to the execution of the License Agreement. (ER 185-305.) Gulf Beach argued that the district court was obligated to ignore California law—the law the parties had chosen to govern their contractual relationship—and apply Alabama law

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[2] Hilton promptly applied to do business in Alabama when it discovered these requirements. (ER 382.)

on this issue. The district court disagreed, and entered an order denying Gulf Beach's motion for summary judgment on May 25, 1993. (ER 384-85.)

As the case proceeded towards trial, Gulf Beach then filed another motion requesting the district court to reconsider its motion to transfer the case to the Southern District of Alabama (ER 2943), which the district court denied on October 13, 1993. (ER 2944.) Frustrated by its inability to secure a transfer of the case to Alabama through conventional means, Gulf Beach next filed a Voluntary Chapter 11 Bankruptcy Petition in the United States Bankruptcy Court for the Southern District of Alabama ("Bankruptcy Court") (ER 1924-25) and a Notice of Removal of this action to the United States District Court for the Southern District of Alabama. (ER 1926-32.) On June 15, 1994, the Bankruptcy Court issued an order remanding the action back to the Central District of California and lifting the automatic stay in bankruptcy to permit the case to proceed to trial in California. (SER 155-59.) The following month, Gulf Beach again filed a *second* motion for reconsideration of its request for a transfer (ER 2950), which the district court denied. (ER 2951.)

The district court also ruled in Hilton's favor on issues of liability. Hilton sought summary judgment on its breach of contract claim based on its view that the undisputed facts established that Gulf Beach had no contractual basis for terminating the License Agreement. The district court granted that motion, and entered its Interlocutory Summary Judgment of Liability on November 12, 1993. (ER 1766-71.) The parties proceeded to try the issue of damages to a jury in October of 1994. The jury awarded Hilton nearly $7 million in damages (ER 2653-54), and Gulf Beach appealed. (ER 2934-37.)

2. On appeal, Gulf Beach did not challenge the district court's denial of its motions to transfer the case to the Southern District of Alabama, and its determina-

tion that California was a proper forum for litigation of the dispute. It nevertheless did challenge the district court's denial of Gulf Beach's motion for summary judgment seeking to enforce the Alabama forum-closing laws in California. It also sought review of the district court's decision on liability.

In a unanimous, unpublished memorandum opinion, the Ninth Circuit affirmed the district court's determination that a California court would apply California law and hold that the License Agreement was enforceable. (Appendix to the Petition for Certiorari at A-2, A-3.) ("Pet. App.") Following this Court's decision in *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496 (1941), the Ninth Circuit held that federal courts sitting in diversity cases must apply the forum state's conflict of law rules. The Ninth Circuit accordingly turned to California law to determine whether the enforceability of the parties' contract should be governed by the law of California or the law of Alabama. The Ninth Circuit determined that California courts would apply California law in this situation based upon that state's express public policy—codified by the legislature—requiring the enforcement of California choice of law clauses in commercial agreements involving more than $250,000. That policy, set forth in Cal. Civ. Code § 1646.5, provides that the parties to a contract involving not less than Two Hundred Fifty Thousand Dollars may agree that California law shall govern their rights and duties under the contract "whether or not the contract, agreement, or undertaking or transaction bears a reasonable relation to this state." (*Id.* at A-2.)

The Ninth Circuit rejected Gulf Beach's contention that "a proper choice of law analysis would include consideration of Alabama's strong policy of prohibiting foreign corporations not registered in the state from enforcing contracts against Alabama citizens" based on its determination that the California statute was designed to super-

sede the interest of other states in the controversy. (Pet. App. at A-2.) The Ninth Circuit upheld the district court's denial of Gulf Beach's motion for summary judgment "[b]ecause under California substantive law Hilton is not precluded from maintaining this action despite its failure to register in Alabama prior to the execution of the License Agreement." (*Id.* at A-3.)

The Ninth Circuit accordingly found it unnecessary to reach alternate grounds for affirmance on this issue also advanced by Hilton. First, Hilton argued that California law should apply under Section 187 of the Restatement of Conflicts (Second) as interpreted by the California Supreme Court even in the absence of Cal. Civ. Code § 1646.5. (Appellee's Brief at 24-27.) Hilton argued that under *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal. 4th 459, 466 (1992), California courts must enforce the parties' choice of law if the "chosen state has a substantial relationship to the parties or their transaction," where it would not conflict with California policy to do so. Second, Hilton fully presented and preserved the argument that the Alabama forum-closing law would not bar its action, even in federal court in Alabama, because the License Agreement represented an interstate transaction. (*See* Appellee's Brief at 27.) *See also Leasing Service Corp. v. Hobbs Equipment Co.*, 707 F. Supp. 1276, 1286-87 (N.D. Ala. 1989). (Petitioner's suggestion in its Petition at 8-9, that this issue was conceded is simply incorrect.) There is accordingly no merit to petitioner's claim (Pet. at 3) that this Court's reversal of the Ninth Circuit's interpretation of the California statute at issue would foreclose any recovery for Hilton under the contract as a matter of law.

With respect to the issue of liability, the Ninth Circuit reversed the district court's decision to enter summary judgment in favor of Hilton. The court determined that there were genuine issues of material fact concerning the reasonableness of various revisions to Hilton's operating

manual that Gulf Beach invoked during the course of litigation in an effort to justify its decision to terminate the Agreement. (*Id.* at A-3, A-4.) The Ninth Circuit remanded the case to the district court for further proceedings on the issue of liability.

REASONS FOR DENYING THE WRIT

Petitioner requests this Court to review the Ninth Circuit's interpretation of a California statute governing the enforceability of choice of law clauses in contracts exceeding $250,000. There is absolutely no basis under this Court's rules to grant review of that state law question. This Court ordinarily defers to the lower courts' interpretations of state law, and there is no reason to depart from that course here. The decision of the Ninth Circuit does not raise any constitutional issues, or conflict with any decision of this Court or any other circuit, as petitioner mistakenly contends. The Ninth Circuit properly determined that California public policy permitted Hilton to enforce the terms of its contract in the courts of California regardless of whether Hilton could have enforced its rights in the courts of Alabama.

I. THE NINTH CIRCUIT CORRECTLY RESOLVED AN ISSUE OF STATE LAW IN A MANNER THAT DOES NOT RAISE ANY CONSTITUTIONAL QUESTIONS

A central issue in this case is whether the enforceability of the parties' contract should be governed by the law of Alabama—the place where petitioner's hotel was located —or the law of California—the law chosen by the parties in their agreement, the place of Hilton's principal place of business, and the place where the contract was negotiated. There is no dispute that the Ninth Circuit properly looked to the law of California to resolve this conflicts issue, because a federal court exercising diversity jurisdiction is required to render judgments in conformance

with the state courts of the forum. *See, e.g., Klaxon,* 313 U.S. at 496-97 (reversing Third Circuit decision in a Delaware diversity action because it applied New York law without determining what law courts of Delaware would have applied under Delaware conflicts principles). The sole question in this case, therefore, is whether the Ninth Circuit erroneously construed Cal. Civ. Code § 1646.5 to require the application of California law in the circumstances of this case.

That issue is simply not appropriate for consideration in this Court. As this Court held in *Klaxon,* "[t]his Court's views are not the decisive factor in determining the applicable conflicts rule" as the forum state is "free to determine whether a given matter is to be governed by the law of the forum or some other law." 313 U.S. at 497. *See also* 313 U.S. at 497 (declining to decide whether Delaware would apply its own law or the law of New York and stating that it was appropriate to "leave this" issue to the Court of Appeals on remand). This Court ordinarily defers to a lower federal court's construction of a state statute, *see, e.g., Planned Parenthood v. Casey,* 505 U.S. 833, 881 (1992), and there is no basis whatsoever to grant review of that state law issue here.

First, petitioner contends that the Ninth Circuit misconstrued California law because it should have applied the multi-factor test set forth in the Restatement (Second) Conflict of Laws ("Restatement") § 187 instead of a "mere California statute" that was "never cited or relied upon by either party." (Pet. at 9.) That contention lacks any factual or legal basis. Although *petitioner* "never cited" the controlling California statute relied upon by the Ninth Circuit, Hilton cited that statute in its brief in the district court, and on five separate pages of its brief in the Ninth Circuit. (Appellee's Brief at 1, 21, 23, 24, 26 (October 18, 1995.)) And the opening sentence of Hilton's argument on this issue contended that "[t]he

district court was required pursuant to Cal. Civ. Code Section 1646.5 to apply California law, not Alabama law, in determining the enforceability of the License Agreement." (*Id.* at 21.) Moreover, it is obvious that the Ninth Circuit was required to apply conflicts principles established in California statutes in preference to principles articulated in a treatise that has not been codified by the California legislature. In *Nedlloyd Lines*, for example, a California Supreme Court decision relied upon by petitioner, the Court stated that "[c]hoice-of-law issues" for contracts subject to the Uniform Commercial Code "are governed by California Commercial Code Section 1105"—a conflicts principle codified by the legislature—even though a variety of other contracts are governed by the Restatement principles under California common law. 3 Cal. 4th at 645 n.2.[3]

Second, petitioner has failed to cite any language in the statute, or California precedents interpreting that Act, in support of its contention that the "California legislature cannot have intended to modify" the application of Section 187 of the Restatement in California courts. (Pet. at 9.) In fact, the language of the statute strongly supports the Ninth Circuit's conclusion that the law was designed to establish an express state policy requiring California courts to enforce California choice of law clauses in contracts in excess of $250,000 even where another state with a substantial relationship to the contract would not enforce the clause. The statute states in explicit terms that

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[3] Contrary to petitioner's contention, *Nedlloyd Lines* is fully consistent with the Ninth Circuit's decision. *Nedlloyd Lines* applied common law Restatement principles to the choice of law question because the contract at issue was not governed by any statutory rule. The Court had no occasion to interpret Cal. Civ. Code § 1646.5 because the parties in *Nedlloyd Lines* had selected Hong Kong law, and Section 1646.5 only applies to contracts that select California law. In addition, the Ninth Circuit would have been required to select California law in this case even if it had applied the common law test adopted in *Nedlloyd Lines*. (*See* Appellee's Brief at 24-27.)

parties "may agree that the law of this state *shall* govern their rights and duties" even where the transaction does not "bear[] a reasonable relation to this state"; that "undertakings selecting California law . . . shall be valid, enforceable and effective" even if they were "entered into . . . before the effective date"; and that "actions and proceedings commencing in a court of this state" must be governed by this section if commenced prior to the effective date of the section. Cal. Civ. Code § 1646.5 (emphasis added).

Petitioners' claim that this statute should only be read to "magnanimously open[] California courts to certain contract disputes involving $250,000 or more" finds no basis in the language. (Pet. at 8.) The section reflects choice of law principles, not just a grant of jurisdiction.[4] In addition, petitioner's effort to paint the Ninth Circuit's interpretation as one that leads to absurd results also fails. Petitioner's contention that this interpretation would permit parties to select Nevada law and thereby operate gambling casinos in Los Angeles is far off the mark. (Pet. at 4.) Section 1646.5 only requires the enforcement of a choice of law clause that selects the law of California—law that obviously conforms to the state's public policy. California courts would accordingly have no obligation to apply Nevada law under Section 1646.5, and would be free to enjoin gambling operations in Los

[4] This characterization finds further support in California decisions interpreting a related provision, Cal. Civ. Code § 1646. That section adopts a general rule that "[a] contract is to be interpreted according to the law and usage of the place where it is to be performed," and California courts have interpreted this section to establish the relevant considerations for deciding conflict of law issues in California. *See, e.g., Hambrecht & Quist Venture Partners v. American Medical Int'l, Inc.*, 38 Cal. App. 4th 1532, 1540 (1995); *Gitano Group, Inc. v. Kemper Group*, 26 Cal. App. 4th 49, 56 n.4 (1994). Section 1646.5 is an exemption to this general conflict of law rule applicable to large contracts pertaining to various commercial subject matters that select California as the governing law.

Angeles, without regard to laws that make gambling lawful in the State of Nevada. Given the unequivocal language of the statute—and petitioner's failure to cite a single California case that construes the statute in any other way—it would have been clear error for the Ninth Circuit to apply Alabama law on the facts of this case.

Third, this case does not present any constitutional issue. Petitioner never advanced *any* constitutional claim in the Ninth Circuit, and its belated reliance on the Tenth Amendment is completely misplaced. Petitioner contends that if the "collective brain trust of the California legislature" intended to foreclose the application of Alabama law here "when it enacted Section 1646.5, it would nevertheless fail, miserably, to effect that purpose in the wake of the Tenth Amendment to the United States Constitution." (Pet. at 9-10.) Without citing a single case, petitioner claims that the "legislature of the State of California" has no "right to rob the State of Alabama" of its right to have Alabama public policy applied by the courts of California. (*Id.* at 10.) According to petitioner, "[i]f the Tenth Amendment means what it says, the public policy of Alabama is not subject to dilution or dissolution by the State of California." (*Id.*)

This Court held in *Klaxon*, however, that the policy of the forum state does control the choice of law, and there is certainly nothing in the Tenth Amendment that compels the State of California to require its courts to apply the public policy of Alabama in preference to the public policy of California.[5] In conformance with its text, this

[5] This Court held in *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 500 (1939) that where two states have conflicting policies, "neither is bound, apart from the compulsion of the full faith and credit clause, to enforce the laws of the other, . . . and the law of neither can by its own force determine the choice of law to be applied in the other." Petitioner presumably chose not to invoke the full faith and credit clause or the Due Process Clause because those constitutional limitations on a state's

Court has interpreted the Tenth Amendment to impose limits on the federal government's power with respect to the states, *see, e.g., Fry v. United States,* 421 U.S. 542, 547 n.7 (1975); *United States v. Darby,* 312 U.S. 100, 124 (1941), and not to impose limits on a state's legislative power with respect to other states. In addition, petitioner waived any claim that the California choice of law rule is unconstitutional by failing to present that issue to the Ninth Circuit. (*See* Appellant's Brief at 17-25; Appellant's Reply Brief at 1-9.) *See, e.g., Lawn v. United States,* 355 U.S. 339, 362 n.16 (1958) (refusing to consider an issue not raised below).

II. THE NINTH CIRCUIT RULING DOES NOT CONFLICT WITH THE JUDGMENTS OF THIS COURT OR ANY OTHER CIRCUIT

As set forth, petitioner does not cite a single case that has construed the California statute at issue in a manner at odds with the Ninth Circuit's decision. Petitioner nevertheless contends that the lower court's ruling "conflicts" with decisions that have upheld the enforcement of the Alabama forum-closing laws. In each of the cases cited by petitioner, however, the federal courts applied Alabama law because the cases were filed in federal courts in Alabama, and the law of the forum controlled. These cases say nothing whatsoever about California conflict of law principles or, for that matter, the conflict of law

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choice of law are satisfied so long as the state has a "significant contact . . . creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Allstate Ins. Co. v. Hague,* 449 U.S. 302, 312 (1981) (plurality opinion); 449 U.S. at 332 (dissenting opinion) (adopting same standard). That standard is readily satisfied here because petitioner has concluded that California has a "substantial relationship" with this contractual dispute (Appellant's Brief at 21), and it is not "arbitrary" or "unfair" to apply the law chosen by the parties. *See, e.g., Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 821 (1985) (remanding case for consideration whether it was "arbitrary or unfair" to apply Kansas law to parties who *had not* selected that law in their contracts).

principles of the home state of the foreign corporation involved in any of these cases.

First, the Ninth Circuit did not "disregard[] a judgment of this honorable Court" in *Chattanooga Nat'l Bldg. & Loan Ass'n v. Denson*, 189 U.S. 408 (1903) as petitioner contends. (Pet. at 3.) In *Denson*, a foreign corporation that had not registered to do business in Alabama sought to enforce a contract with an Alabama resident by filing suit in federal district court in Alabama. 189 U.S. at 408-09. This Court held that the foreign corporation could be "repelled from court" in Alabama because the contract it sought to enforce was made in violation of Alabama law. *Id.* at 416. The sole issue in *Denson* was whether the foreign corporation had in fact engaged in acts that constituted "doing . . . business" in the state, within the meaning of Alabama law. *Id.* at 413. Nothing in *Denson* purports to require state or federal courts in California to disregard the public policy of California and to dismiss any contract action that would contravene the forum-closing policy of Alabama. That issue was simply not presented in *Denson*.

Second, that issue was also not resolved in any of the three decisions of the courts of appeals cited by petitioner. (*See* Pet. at 3.) Petitioner correctly contends that the Fifth and Eleventh Circuits have "upheld enforcement of the same Alabama constitutional provision in federal courts in diversity cases," but neglects to mention that all three of those cases concerned diversity actions filed in Alabama district courts, where there could be no question but that the policy of Alabama should govern the outcome. (*Id.*) *See Advance Indus. Secur., Inc. v. William J. Burns Int'l Detective Agency*, 377 F.2d 236, 238 (5th Cir. 1967) (holding that Alabama law barred a Florida corporation's suit in federal district court in Alabama because it had not qualified under the forum-closing statute); *Continental Tel. Corp. v. Weaver*, 410 F.2d 1196 (5th Cir. 1969) (dismissal of action brought

by foreign corporation in district court in Alabama); *S&H Contractors v. A.J. Taft Coal Co.*, 906 F.2d 1507, 1509 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991) (dismissing suit for breach of contract filed in the federal district court in Alabama, relying on the Alabama forum-closing statute).

Nothing in those decisions suggests that the Alabama law has sufficient force to bar enforcement of the contract in any forum. In fact, in *S&H Contractors*, a district court in Alabama held that a foreign corporation could not pursue an action in federal court in Alabama, and a district court in Georgia enjoined arbitration proceedings, finding that the contract was void under Alabama law. In a consolidated appeal, the Eleventh Circuit declined to affirm the decision of the Georgia district court to enjoin arbitration proceedings on that theory. The Eleventh Circuit concluded that the "issue whether the contract . . . is void for all purposes presents extremely difficult questions of state law" and held that under federal law, the foreign corporation had waived its right to arbitrate by unduly delaying its demand for arbitration. 906 F.2d at 1514.

Moreover, the decisions relied upon by petitioner simply do not conflict with the holding of the Ninth Circuit in any respect. Each of those decisions, like the decision of the Ninth Circuit at issue here, is premised on a federal court's obligation to apply the law of the forum under *Erie R.R. v. Tompkins*, 304 U.S. 64, 78-79 (1938). If the Ninth Circuit had done what petitioner demands—disregarded the California statute in favor of Alabama law—it would have violated the principles established by this Court in *Klaxon*. This Court emphasized in *Klaxon* that the key in diversity cases is to ensure "uniformity within a state" where the federal court sits—not uniformity with federal courts hearing diversity cases in other states. 313 U.S. at 496. As this Court stated: "Whatever lack of uniformity this may produce between federal courts in

different states is attributable to our federal system, which leaves to a state, within the limits permitted by Constitution, the right to pursue local policies diverging from those of its neighbors." *Id.* As in *Klaxon*, any "lack of uniformity" between the decisions of federal courts in Alabama to enforce the forum-closing policy of that state, and the decision of a federal court in California to enforce California policy instead, represents a permissible attribute of "our federal system." *Id.*

CONCLUSION

For the reasons set forth, respondent respectfully requests this Court to deny the petition for certiorari.

Respectfully submitted,

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Dated: March 14, 1997

APPENDIX

United States Constitutional Amendment X:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Alabama Constitution, Article XII, § 232. Foreign corporations doing business in state.

No foreign corporation shall do any business in this state without having at least one known place of business and an authorized agent or agents therein, and without filing with the secretary of state a certified copy of its articles of incorporation or association. Such corporation may be sued in any county where it does business, by service of process upon an agent anywhere in the state. The legislature shall, by general law, provide for the payment to the state of Alabama of a franchise tax by such corporation, but such franchise tax shall be based on the actual amount of capital employed in this state. Strictly benevolent, educational, or religious corporations shall not be required to pay such a tax.

Alabama Code § 10-2A-247 (1975). Transacting business without certificate of authority.

(a) All contracts or agreements made or entered into in this state by foreign corporations which have not obtained a certificate of authority to transact business in this state shall be held void at the action of such foreign corporation or any person claiming through or under such foreign corporation by virtue of said void contract or agreement; but nothing in this section shall abrogate the equitable rule that he who seeks equity must do equity; provided, that the failure of a foreign corporation to obtain a certificate of authority shall not impair the validity of any contract or agreement heretofore or hereafter entered into and consisting of a mortgage upon real

property or an interest in real property in this state, and the note secured thereby, where the mortgage is insured by the Federal Housing Administration or guaranteed by the Veterans Administration, if said foreign corporation shall have thereafter obtained a certificate of authority. In all actions against such foreign corporation, or against any person claiming under such foreign corporation by virtue of such void contract, the foreign corporation or such person claiming under it shall be held to be estopped from setting up the fact that the contract or agreement was so made in violation of law. In all actions against foreign corporations which have not obtained a certificate of authority, the summons or other process may be served upon the officer, agent or employee of the foreign corporation who acted for or represented such foreign corporation in making the contract or agreement sued upon. (Acts 1980, No. 80-633, p. 1094, § 135.)

Alabama Code § 40-14-4 (1975). When contract void; qualification by foreign corporation to do business in state.

All contracts made in this state by any foreign corporation which has not first complied with the provisions of Section 40-14-1 through 40-14-3 shall, at the option of the other party to the contract, be wholly void at the action of such foreign corporation or any person claiming through or under such foreign corporation by virtue of such contract, unless said contract, heretofore or hereafter executed, consists of a mortgage upon real property or an interest in real property in this state, and the note secured thereby, where the mortgage is insured by the Federal Housing Administration or guaranteed by the Veterans Administration, and unless said foreign corporation shall have thereafter qualified to do business in this state. Before so qualifying, such foreign corporation shall be required to pay all qualification fees or admission taxes required by Sections 40-14-1 through 40-14-3 for all years or parts of years which it transacted business in

this state, together with such interest and penalties thereon as may be assessed in accordance with law. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 342; Acts 1970, Ex. Sess., No. 34 p. 3657.)

California Civil Code § 1646.5 (West 1997):

Notwithstanding Section 1646, the parties to any contract, agreement or undertaking, contingent or otherwise, relating to a transaction involving in the aggregate not less than two hundred fifty thousand dollars ($250,000), including a transaction otherwise covered by subdivision (1) of Section 1105 of the Commercial Code, may agree that the law of this state shall govern their rights and duties in whole or in part, whether or not the contract, agreement, or undertaking or transaction bears a reasonable relation to this state. This section does not apply to any contract, agreement, or undertaking (a) for labor or personal services, (b) relating to any transaction primarily for personal, family, or household purposes, or (c) to the extent provided to the contrary in subdivision (2) of Section 1105 of the Commercial Code.

This section applies to contracts, agreements, and undertakings entered into before, on, or after its effective date; it shall be fully retroactive. Contracts, agreements, and undertakings selecting California law entered into before the effective date of this section shall be valid, enforceable, and effective as if this section had been in effect on the date they were entered into; and actions and proceedings commencing in a court of this state before the effective date of this section may be maintained as if this section were in effect on the date they were commenced.